

# SENATE BILL REPORT

## SSB 5378

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As Amended by House, March 6, 2008

**Title:** An act relating to deeds of trust.

**Brief Description:** Modifying deeds of trust provisions.

**Sponsors:** Senate Committee on Judiciary (originally sponsored by Senators Weinstein, Kline and Rockefeller).

**Brief History:**

**Committee Activity:** Judiciary: 1/16/07, 2/09/07 [DPS].

Passed Senate: 2/14/08, 48-0.

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### SENATE COMMITTEE ON JUDICIARY

**Majority Report:** That Substitute Senate Bill No. 5378 be substituted therefor, and the substitute bill do pass.

Signed by Senators Kline, Chair; Tom, Vice Chair; Carrell, Hargrove, Murray and Weinstein.

**Staff:** Dawn Noel (786-7472)

**Background:** A deed of trust is a document in which a borrower incurs a debt obligation in exchange for real estate. The deed of trust transfers title to the borrower, yet the trustee has a lien against the property until the borrower pays off the obligation in full. If the borrower defaults on the obligation, for example by failing to make a payment under the deed of trust, the trustee may foreclose on the property by conducting a public sale. The Deeds of Trust Act (Act) currently does not specify what fiduciary duties, or duties of care, the trustee owes to the lender versus the borrower of a deed of trust.

One seeking to stop a foreclosure sale must apply for a preliminary injunction from a court and post a certain amount of security with the court. The challenger or borrower must deposit with the court either the "principal, interest, and reserves" required monthly under the deed, if the borrower is in default of such payment, or the amount of monthly interest required, if the obligation is then payable in full. In stating such security requirements, the Act does not differentiate between commercial and residential foreclosures.

Trustees must disclose to the borrower the amount required to reinstate the promissory note and deed of trust. However, trustees currently have no obligation to timely disclose the amount necessary to satisfy the full amount required. Trustees also have no obligation to provide written notice concerning postponement of a foreclosure sale; currently they may

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continue the sale by oral proclamation. The Act permits agents of title companies to be trustees, so long as one officer of the title company is a Washington resident, and the trustee has a Washington street address.

**Summary of Substitute Bill:** A trustee has no fiduciary obligation to any persons having an interest in the property subject to the deed of trust. However, the trustee or successor trustee under a deed of trust has a duty of fairness and impartiality to the grantor, beneficiary, and other persons having an interest in the property subject to the deed of trust. The trustee may decline to complete a foreclosure sale or deliver the trustee's deed and refund the purchase price, if it appears that the bidding has been collusive or defective, or that the sale might have been void.

In considering an application for a preliminary injunction to stop a residential foreclosure sale, a court may require whatever security it deems proper as a condition to granting the injunction. In determining the amount of security, the court shall consider the potential costs, fees, and damages suffered by the opposing party if the court later determines that the challenger wrongfully sought the injunction. A court may restrain a residential or commercial foreclosure sale on any proper "legal or equitable" ground, and issue a temporary restraining order, when warranted.

Trustees must disclose the amount necessary to satisfy the obligation in full, and to provide such disclosure within 10 days of receiving a written request for such. As to notice of postponement, a trustee must submit written notice no less than four days before the new date and time of sale, when the new sale occurs within seven days of the postponement. When the sale is postponed to a date beyond seven days into the future, the trustee must submit written notice within three days of postponement. A trustee must also maintain a Washington address, where the trustee maintains physical presence and telephone service at that address.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony on Original Bill:** PRO: Confusion exists regarding what duties a trustee owes to the debtor versus the lender, resulting in many lawsuits. The existence of duties to both the lender and the debtor creates a conflict of interest for the trustee. This bill strikes a fair compromise in eliminating the existence of trustee duties to either party, while giving a judge discretion in determining how much security to require from the debtor in a debtor's action to restrain a foreclosure sale. This way, a debtor is protected from potentially unfair practices by the trustee. Many attorneys for both debtors and creditors were consulted on the bill, which has wide support.

**Persons Testifying:** PRO: John Gose, Aleana Harris, Real Property, Probate and Trust Section, Washington State Bar Association.

**House Amendment(s):** Removes the language requiring the trustee to have a duty of fairness and impartiality to the grantor, beneficiary, and other persons having an interest in the real property

subject to the deed of trust. Adds in its place language requiring the trustee to act impartially between the borrower, grantor, and beneficiary.

Limits the people to whom a trustee must provide written notice of an oral postponement of a foreclosure sale, those people being the borrower, grantor, and junior lien holders. Also states that such notice is necessary only if the sale is postponed beyond the originally scheduled date.

Removes the provision requiring judges to require debtors to pay security when a debtor attempts to enjoin a foreclosure sale of residential property.

Removes distinctions in how the law applies to sales of residential versus nonresidential property.